Ideology, Judicial Selection and Judicial Ethics

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In the fall of 1986, there was a bitter fight against the retention of three members of the California Supreme Court, Rose Bird, Joseph Grodin, and Cruz Reynoso. Exactly a year later, the nation's attention focused on the battle over Robert Bork's confirmation to the United States Supreme Court. There were ironic parallels between these two events. In both instances, public opinion and media reporting played an unprecedented role in the judicial selection process. In each situation, there were arguments over whether the candidates' ideology should be a major factor in the evaluations.

In California, conservatives argued that the three incumbent justices should be rejected because of their liberal views and prior votes, especially in death penalty cases. Liberals in California argued that assuring judicial independence required that the evaluation be limited to the justices' competence; that the individuals' ideology and prior votes should play no role in the retention election. But the sides were reversed in the battle over Bork. It was the liberals who argued that Bork should be rejected because of his conservative views and prior votes as a court of appeals judge. Conservatives argued that evaluation should be limited to the nominee's competence—that his ideology and prior votes should play no role in the Senate's confirmation decision.

A cynic might observe that these experiences reflect a pattern of public rhetoric. If your position is in tune with public sentiment, you use ideology as an issue in your arguments; but if your candidate's positions are against the weight of public opinion, you maintain that ideology is irrelevant and that judicial candidates should be evaluated solely on the basis of professional qualifications.

Such an appraisal, while an accurate description of the recent events, ignores the crucial underlying question of how judicial candidates should be evaluated. The issue will certainly arise in the future, if for no other reason than that ideology was successfully used to defeat Bird, Bork, Grodin, and Reynoso. Moreover, the simultaneous election of George Bush as President and of a Democratically controlled Senate will likely lead to conflicts over judicial nominees. While the experiences of the past two years are still fresh in mind, it is important to consider what criteria should be used in evaluating candidates for judicial office. Many scholars have criticized the Senate's rejection of Bork and the California voters' rejection of Bird, Grodin, and Rey-

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noso.[1] Are these objections valid? If so, how should the process of evaluating judicial candidates be conducted?

This article is divided into four major sections. Part I outlines three different answers to the question of how judicial candidates should be evaluated. Part II defends one of these approaches—that it is appropriate to evaluate prospective judges based on their ideology and their likely decisions on important issues once on the bench. Allowing such ideological evaluation raises the question of how a person's ideology can be ascertained; what questions may prospective judges be required to answer? The basis for ideological evaluation is discussed in part III. Finally, part IV considers whether such an approach to judicial selection is consistent with the current standards of judicial ethics and, if not, what changes should be made.

This article does not directly address the issue of what system for selecting judges—elections or appointments—is best.[2] Rather, the central focus is on how judicial candidates should be evaluated regardless of the system used. The phrase "judicial candidate" is used throughout this article to refer to a person being considered for any state or federal judicial office. Whether the evaluator is the President, the Senate, a governor, a state legislator, or a voter, the underlying issue is essentially the same: what are the permissible grounds for evaluating potential judges?

I. ALTERNATIVE APPROACHES TO EVALUATING JUDGES

I can identify three different models that have been advanced as to how judicial candidates should be selected and evaluated. Each has its strong supporters. One might be termed the *professional qualifications model.* Under this approach, candidates for judicial office—state or federal—should be evaluated only on the basis of their credentials: their education, the nature of their legal practice, their prior judicial experience, and any other indicia of their competence and ability to serve as a judge. The professional qualifications model expressly excludes consideration of an individual's ideology or likely voting in particular cases.

For the most part, the criteria used by the American Bar Association in evaluating nominees reflect this model. The American Bar Association's rating of a judicial candidate is based on the individual's "character, temperament, and professional aptitude and experience"; evaluation is not supposed

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1. *See, e.g.*, Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (criticizing Bork rejection); Uelman, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333 (1988) (criticizing rejection of California Supreme Court Justices in 1986 retention election).

2. However, I do discuss whether differences in the method of selection justify differences in the criteria used in evaluation. *See infra* text accompanying notes 30-31.

to include consideration of the individual's views or ideology.[3] The Twentieth Century Fund's Task Force on Judicial Selection recently declared that "choosing candidates for anything other than their legal qualifications damages the public's perception of the institutional prestige of the judiciary and calls into question the high ideal of judicial independence."[4]

Supporters of both Bird and Bork argued that this was the model to be used and that each should be approved because of excellent professional qualifications.[5] For example, Professor Bruce Ackerman described the rejection of Robert Bork as a "tragedy" on the grounds that Bork was "among the best qualified candidates for the Supreme Court of this or any other era. Few nominees in our history compare with him in the range of their professional accomplishments."[6]

A second approach can be termed the *judging skills model.* Under this approach, in addition to professional qualifications, it is permissible for the evaluator—be it the voter, the Executive, or the Senate—to examine the candidate's skills as a judge, assuming that the candidate has served in a prior judicial position. Supporters of this approach look to factors such as the judicial candidate's use of precedent, the quality of his or her written opinions, his or her temperament on the bench, and the like. As with the professional qualifications approach, the judging skills model expressly excludes consideration of an individual's ideology in evaluating potential judges.

For example, Professor Michael Moore argued against the retention of Chief Justice Rose Bird, but expressly disclaimed that his position was based on an ideological disagreement.[7] Professor Moore maintained that Chief Justice Bird should have been rejected because he believed that her vote to reverse every death penalty case to come before her reflected closed-mindedness and impermissibly result-oriented judging.[8] Similarly, Professor Judith Resnick in her Senate testimony against Robert Bork focused on his judging skills and not on his ideology.[9] She specifically criticized the breadth of his

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3. AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983).

4. TWENTIETH CENTURY FUND, REPORT OF THE TASK FORCE ON JUDICIAL SELECTION, *Judicial Roulette* (1988) [hereinafter TWENTIETH CENTURY FUND REPORT].

5. *See, e.g.*, Chemerinsky, *The Judicial Conscience of a Conservative*, L.A. Herald Examiner, Sept. 24, 1986 at A13, col. 1; Chemerinsky, *High Court Vote*, San Fran. Examiner, Sept. 4, 1986; Cutler, *Saving Bork from Both Friends and Enemies*, N. Y. Times, July 16, 1987 at A27, col.1.

6. Ackerman, *supra* note 1, at 1164.

7. *See, e.g.*, Moore, *Politics is Not the Basis for Judging the Judges*, L.A. Times, July 29, 1985, Part II at 5, col. 1; Moore, *Justices' Personal Values Must at Times Give Way*, L.A. Times, July 30, 1985, Part II at 5, col. 4; Moore, *Rose Bird Should Go: On Death Penalty She Has Taken Law Into Her Own Hands*, L.A. Times, July 31, 1985, Part II at 5, col. 3.

8. Moore, *Rose Bird Should Go, supra* note 7.

9. Transcript of Proceedings, Senate Comm. on the Judiciary, Hearing on the Nomination of Honorable Robert H. Bork to be Associate Justice of the Supreme Court of the United States (Sept.

opinions and his resolution of questions not raised in the specific cases before him.[10]

A third approach can be termed the *ideological orientation model.* Although this model certainly includes evaluation of professional qualifications and judging skills, it differs from the first two approaches because it expressly permits consideration of an individual's ideology in the selection process. Specifically, the evaluator is allowed to examine a judicial candidate's views on important issues in deciding whether to approve or reject the individual. Many of the critics of both Bird and Bork employed this model. Chief Justice Bird, for example, was opposed for her opposition to capital punishment and also for her liberal rulings protecting consumers and employees.[11] Judge Bork was attacked for his writings criticizing Supreme Court cases protecting the right of privacy, applying the equal protection clause to gender discrimination, and using the First Amendment to protect speech not concerned with the political process.[12] In short, the debates over Bird and Bork were primarily battles over which of these three models should be followed. The model selected determines the appropriate criteria for evaluation.

It must be recognized that, as with any such models, these are only descriptions of approaches in very general terms. Within each there are many specific questions that must be answered, including: how to appropriately measure professional qualifications; how to evaluate judging behavior; what are the permissible ways for determining ideology? Also, it is not always possible in practice to neatly separate the models. Professional qualifications are looked to, in large part, as a way of predicting judging skills.

Admittedly, these three models are oversimplifications. However, they do provide a basis for analysis and discussion. The starting place in evaluating a judicial candidate must be a decision as to which approach should be used.

II. IDEOLOGY MATTERS

I contend that the evaluation of judicial candidates—by the President or a governor, by the Senate or the voters—should include consideration of ideology. That is, in deciding whether to appoint, approve, or retain a judge, consideration should include examination of the individual's professional

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25, 1987) (testimony of Prof. Judith Resnick) (copy on file with the Georgetown Journal of Legal Ethics).

10. *Id.* at 312-13.

11. *See, e.g.,* P. JOHNSON, THE COURT ON TRIAL (1985); Cook and Kang, *Facing Judgment: The Rose Bird Court,* San Fran. Examiner, January 5, 1986, at A-1.

12. *See* SENATE COMM. ON JUDICIARY, 100TH CONG., 2D SESS., RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD, *reprinted in* 9 CARDOZO L. REV. 219 (1987).

qualifications, his or her judging skills, and also, his or her ideology. It is appropriate and necessary to focus on the individual's views on important issues that are likely to come before his or her court. It is acceptable and, in fact, essential that the evaluator reject a nominee whose views are deemed to be objectionable.

At first blush, this might appear to be a radical suggestion. I contend, however, that it is the description which best describes how judicial candidates have been evaluated throughout American history. Early in American history, President George Washington appointed John Rutledge to be the second Chief Justice of the United States.[13] Rutledge was impeccably qualified; he already had been confirmed by the Senate as an Associate Justice (although he never actually sat in that capacity). The Senate rejected Rutledge for the position of Chief Justice because of its disagreement with Rutledge's views on the United States treaty with Great Britain. Furthermore, throughout the nineteenth century, the Senate rejected many nominees on ideological grounds. Professor Grover Rees explains that "during the nineteenth century only four Supreme Court Justices were rejected on the ground that they lacked the requisite credentials, whereas seventeen were rejected for political or philosophical reasons."[14]

Likewise, during this century, Presidential nominees for the Supreme Court have been rejected even when they possess outstanding professional qualifications. In 1930, a federal court of appeals judge, John Parker, was denied a seat on the high Court because of his anti-labor, anti-civil rights views.[15] In 1969, the Senate rejected United States appeals court judge Clement Haysworth largely because of his anti-union views.[16] Thus the defeat of Robert Bork was in line with a tradition as old as the republic itself.

Of course, such a description is not a normative defense of the appropriateness of considering ideology in evaluating nominees. The ideological orientation model can be defended in the simplest terms: ideology should be considered because ideology matters. Judges are not fungible; a person's ideology influences how he or she will vote on important issues. It is appropriate for an evaluator to pay careful attention to the likely consequences of an individual's presence on a court.

In defending the ideological orientation model, it is useful to begin with a thought experiment. Imagine that the President appoints someone who it

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13. For a description of the Rutledge nomination and rejection, see L. TRIBE, GOD SAVE THIS HONORABLE COURT 79-80 (1985).

14. Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 944 (1983).

15. L. TRIBE, *supra* note 13, at 87, 90-91; O'Brien, *Background Paper*, in TWENTIETH CENTURY FUND REPORT *supra* note 4 at 77 (1988) [hereinafter Background Paper].

16. Background Paper, *supra* note 15, at 77.

turns out is an active member of the Klu Klux Klan or the American Nazi party and who had repeatedly expressed racist and anti-semitic views. Assume that the nominee has impeccable professional qualifications: a degree from a prestigious university, years of experience in high level law practice, and a strong record of bar service. I would think that virtually everyone would agree that the nominee should be rejected.

Presidents and governors have always selected nominees because of their ideology. Governor Jerry Brown selected Rose Bird because of their ideological compatibility. President Reagan nominated Robert Bork precisely because of Bork's conservative views. Accordingly, the evaluators—the voters or the Senate—are justified in also looking to ideology.

Early in this century, the legal realists exploded the myth that judging is discretion-free and that formalism is possible. Judges often possess substantial discretion—especially in interpreting an expansively worded document like the Constitution. Ideology inevitably influences the exercise of that discretion. A study published in the *Columbia Law Review* examined the voting patterns of federal court of appeals judges.[17] It revealed that judges appointed by Democratic presidents vote in favor of the government in civil cases less than forty percent of the time.[18] In contrast, judges appointed by Republican presidents vote in favor of the government over sixty percent of the time.[19] Particularly in civil rights cases, Democratic judges vote in favor of the plaintiff more often than do Republican judges.[20] For purposes of comparison, this study found that a group of conservative court of appeals judges, including Robert Bork, voted against parties "assert[ing] a liberal claim" in close to ninety percent of the cases.[21] Although such "scorecards" can be misleading, they prove what few would dispute: a person's political views influence his or her performance on the bench. Everyone knows that William Rehnquist and William Brennan frequently disagree in cases involving constitutional questions. Both are conscientiously performing their judicial duties, yet their ideological disagreement consistently results in differing votes. Thus, if there is a vacancy on the court, it is appropriate to consider whether the evaluator wants someone with Rehnquist's or Brennan's views. People do and should care about how the court will decide important issues.

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17. Note, *All the President's Men: A Study of Ronald Reagan's Appointees to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987).

18. *Id.* at 789.

19. *Id.*

20. *Id.* at 770-71.

21. *Id.* at 779 n.66. For an excellent discussion of the Reagan administration's belief that the ideology of judges matters and its attempt to fill the federal judiciary with conservatives, see H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988).

Hence, they should pay attention to the effects of their judicial choices on the matters that concern them the most.

Opponents to the ideological orientation model must sustain one of two arguments: either that an individual's ideology is unlikely to affect his or her decisions on the bench, or that even if ideology will influence decisions, it should not be examined because disadvantages to such consideration will outweigh any advantages.

The former argument, that a person's ideology is unlikely to affect performance in office, is impossible to sustain. Unless one believes in truly mechanistic judging, it is clear that judges possess discretion and that the exercise of discretion is strongly influenced by an individual's pre-existing ideological beliefs. For example, in cases involving questions of constitutional or statutory interpretation, the language of the document and the intent of the drafters often will be unclear.[22] Thus judges will often be required to supply the meaning. Moreover, in common law cases courts are left to decide the appropriate content of judicially created documents. Many cases, especially in constitutional law, involve a balancing of interests. The relative weight assigned to the respective claims often turns on the judge's own values. Given the reality of the judicial decisionmaking process, it is difficult to support the claim that a judge's ideology will not impact his or her decision.

The latter argument against considering a judicial candidate's views is much stronger: that even though ideology matters, the ideological model should not be followed because of its undesirable effects. Several disadvantages of the ideological orientation model have been advanced. The most forceful of these arguments is that it will undermine judicial independence. Professor Stephen Carter argues that considering a nominee's views on questions of constitutional theory threatens judicial independence.[23] Professor Carter contends that the Supreme Court exists as a counter-majoritarian institution and that its ability to protect the Constitution's values from the excesses of majority rule is likely to be jeopardized by intense scrutiny of judicial candidates. He states that

> [i]f a nominee's ideas fall within the very broad range of judicial views that are not radical in any non-trivial sense—and Robert Bork has as much right to that middle ground as any other nominee in recent decades—the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection.[24]

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22. *See* E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).

23. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

24. *Id.* at 1198. The Report of the Twentieth Century Fund Task Force on Judicial Selection also recently took the position that evaluation of judicial candidates based on their ideology poses a threat to judicial independence. *See supra* note 4.

The critical weakness in Professor Carter's argument is that it is not clear why judicial independence requires blindness to ideology during the nomination or confirmation of a federal judge. Professor Carter maintains that independence requires protection of individuals from scrutiny from the earliest moments of the selection process. According to Carter:

> Judicial independence, if the concept is to have any force, is not a cloak that can be thrown around a new Justice at the very last minute—after the administration of the oath. Independence must arrive earlier, and cover all potential nominees, from the moment that sitting Justice retires or dies. A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents.[25]

However, judicial independence means that a judge should feel free to decide cases according to his or her view of the law and not in response to popular pressure. As such, Article III's assurance of life tenure and its protection against a reduction in salary guarantee independence. Judges are free to decide each case according to their conscience and best judgment; they need not worry that their rulings will cost them their seats or their salary. Professor Carter never indicates why this is insufficient to preserve judicial independence. In the above quotation, he subtly shifts the definition of independence, from autonomy while in office to autonomy from scrutiny before being in office. But he does not explain why the latter, freedom from evaluation before ascending to the bench, is a prerequisite to independence in the former, far more meaningful sense.

In fact, it is precisely because federal judges are essentially immune from external checks once they are on the bench that it is essential that they be carefully scrutinized prior to their confirmation. Much of constitutional scholarship in the last quarter of a century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty"—the exercise of substantial power by unelected judges.[26] Perhaps the most significant majoritarian check is at the nomination and confirmation stage. After judges are on the bench, judicial independence is essential for all of the reasons Professor Carter describes. He implicitly assumes that preserving the counter-majoritarian function of the courts requires complete exclusion of all majoritarian influences at any point in the system. Not only is this impossible, but it is quite undesirable. Selection by the President and confirmation by the Senate properly exists precisely to have some majoritarian influence over the composition of the federal courts.[27]

Finally, Professor Carter's position requires that both the President and

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25. Carter, *supra* note 24, at 1194.

26. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

27. *See* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-85 (1957) (arguing that since presidents do not appoint justices hostile to their

Congress avoid examining an individual's ideology. If preserving the Court's function as an anti-majoritarian body requires, as Professor Carter argues, blindness to ideology, then all in the process must avoid attention to ideology. In fact, if the President appoints an individual reflecting the majority's views on an important issue, an aggressive Senate role permits Senators representing minority viewpoints to provide a check. At minimum, so long as the President considers ideology, there is a majoritarian presence in the selection process and it is equally appropriate for the Senate to focus on ideology in the confirmation process.

An alternative argument against the use of ideology is that it will deadlock the selection process—liberals will block conservatives and vice versa. Although there have been times in history when several nominees in a row have been defeated, ultimately a compromise candidate always was found.[28] Most likely, aggressive review of judicial nominees would result in more centrist judges because candidates would have to please evaluators of all viewpoints. Although both liberals and conservatives will lose some of their persuasion on the courts, the existence of a more moderate Court might have many benefits, such as stability and more widespread acceptability of the law.

A variation of this criticism of a deadlock in the selection process is concern that attention to ideology will lead to litmus tests for nominees based on their views on one or two or a few specific issues. The Republican platforms in 1980 and 1984, for example, exhorted the President to appoint only federal judges who adhered to the pro-life position on the issue of abortion.[29] However, this objection is not a reason to reject the ideological orientation model, but is instead an argument against a particular way of using the model. In other words, if one opposes the use of litmus tests for judicial candidates, then one should urge use of a broader basis for assessing ideology. By analogy, if someone using the professional qualifications model focused only on where nominees went to law school, the appropriate response would be to enlarge the basis for evaluating professional qualifications. Likewise, concern about single issue ideological tests justifies expanding the grounds for evaluation, not rejecting the ideological orientation model.

Another basis for criticizing the ideological orientation model is to argue that it should be used only some of the time. For example, one might claim that it should be used in initial appointments, but not in retention election; or that it should be followed by the President, but not by the Senate; or that it should be used for Supreme Court Justices, but not for lower court judges.

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own public policy views, and Senate is unlikely to confirm appointee at odds with majority, policy views dominant on Court are in line with dominant views among lawmaking majorities).

28. *See*, L. TRIBE, *supra* note 13, at 58-9 (rejection of several nominees by President Tyler).

29. *See* H. SCHWARTZ, *supra* note 21, at 5 (discussing Reagan administration efforts to pack federal courts with "right-thinking" judges).

The most persuasive distinction is that the ideological orientation model should be used in initially reviewing a nominee for a position on a court, but in a retention election an individual's ideology should not be considered. [30] The argument is that a judge on a court should decide each case without an eye toward the coming retention election. The only way to assure such impartiality is to prevent consideration of the judge's decisions in the subsequent election. This argument can be used to justify how liberals could both oppose Robert Bork and support Rose Bird: the former was an initial appointment, while the latter was a retention election.

Although I recently argued in print in favor of this distinction, I am no longer persuaded by it.[31] Treating retention elections differently makes sense only if one believes that ideological consideration in them will influence judicial decisions *and* that it is possible to exclude ideological consideration from the election process. The latter seems impossible. If the Bork, Bird, Grodin, and Reynoso rejections demonstrate anything, it is that people evaluate nominees based on ideology. In fact, so long as a judge even thinks that ideology might matter in the subsequent election, there is the danger that a desire to please the voters might influence decisionmaking. Inherent to judicial elections is the risk that voters will evaluate judges based on their decisions and opinions.

Furthermore, the concern that the election process will influence decisions is best dealt with by abolishing or reforming that process, not by preventing consideration of ideology. Elections are particularly poorly suited to selecting judges because of the difficulty voters have in informing themselves and evaluating candidates.[32] In any event, ideology is so important in determining who is desirable for a seat on the bench, that concerns for judicial independence should be dealt with by reforming other aspects of the process and not by prohibiting examinations of ideology.

Alternatively, some might contend that it is permissible for the President to look to ideology, but not permissible for the Senate to do so. This argument is unsupported by history. The framers of the Constitution definitely intended for the Senate to play an independent and aggressive role in evaluating nominees for judicial office.[33] More importantly, such Senate deference is unjustified because the President possesses no special expertise in selecting judges. Checks and balances are the core of the design of the federal system and Senate confirmation is a crucial check on presidential choices.

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30. Chemerinsky, *Evaluating Judicial Candidates*, 61 So. CAL. L. REV. 1985 (1988).

31. *Id.* at 1989-92.

32. There is an extensive body of literature demonstrating voter ignorance in judicial election, *see, e.g.*, P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980); Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. BAR J. 152 (1976); Beechan, *Can Judicial Elections Express the People's Choice?*, 57 JUDICATURE 242 (1974).

33. *See* Background Paper, *supra* note 15, at 29-35.

Finally, it might be argued that the ideological orientation model should be used for state or federal supreme court justices, but not for lower court judges. The argument is that the former have substantial discretion in interpreting the Constitution, making ideology particularly important. Because lower court judges possess less discretion, ideology should not be considered. However, judges at all levels possess enormous discretion. All of the cases ruled on at the highest level are first considered in a trial court. In fact, many similar cases never make their way to the Supreme Court. With so few cases ever reaching the Supreme Court, the decisions of the trial and appeals courts become rather significant. Although lower courts possess less discretion and decide more "easy cases," ideology should be considered in evaluations because there still is sufficient opportunity for ideology to manifest itself in decisionmaking.[34]

A final objection to the ideological orientation model concerns the appropriate record for determining a nominee's views. Unless the nominee has extensive writings documenting his or her positions on controversial issues—such as Robert Bork did—how is the evaluator to know the judicial candidate's ideology? This issue is examined in part III.

In summary, the argument for the ideological orientation model is simple: people should care about the decisions likely to come from a court on important issues; the ideological composition of the court will determine those decisions; and the appropriate place for majoritarian influences in the judicial process is at the selection stage. In fact, one can wonder whether it really is ever possible to select judges without some attention to ideology. A rejection of the ideological orientation model does not necessarily mean that ideology can be excluded from consideration. More likely, ideology still is present in the evaluation, but never openly acknowledged; ideological objections get rephrased as arguments against judicial skills or professional qualifications.

III. THE BASIS FOR IDEOLOGICAL EVALUATION

The ideological orientation model requires attention to a judicial candidate's views on issues. This raises two questions. First, how is it determined which issues should be examined as part of the ideological evaluation? In other words, just as the professional qualifications model necessitates a determination of the criteria for evaluating qualifications and the judging skills model requires a measure of judging skills, so does the ideological orientation model demand an elaboration of the basis for evaluating ideology. Second, how should an individual's ideology be determined? Once the content for

34. For example, the Report of the Twentieth Century Fund Task Force on Judicial Selection recently recommended more intensive scrutiny for appointees to lower federal courts because of the importance of these positions. *See* TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 8.

evaluation is determined, it is necessary to decide the method for implementing the model in assessing particular candidates.

The ideological orientation model permits consideration of an individual nominee's views on: 1) the appropriate method of judicial review; 2) the appropriate content of legal doctrines likely to be decided by the judge's court; and 3) the appropriate results in particular types of cases. First, evaluation of judicial candidates should include consideration of their views on methodological questions. For example, it is appropriate to consider whether a nominee for a federal judicial office believes that the rights protected by the Constitution should be limited to what the framers intended or whether it is appropriate for the court to protect rights not contemplated by the drafters.[35] Although I personally believe that any nominee who expresses a strictly originalist philosophy should be rejected as unacceptable, I recognize that the ideological orientation model licenses the rejection on non-originalists if a majority of the Senate were committed to the opposing philosophy.[36] Similarly, evaluation of a person's judicial methodology should include consideration of his or her views on the role of precedent and when it is appropriate to overrule prior decisions.[37] A Senate particularly concerned with preserving or discarding particular decisions is likely to be very attentive to the nominee's position on the role of stare decisis. In evaluating state judges, attention might be paid to an individual's belief concerning when it is appropriate for the court to create new common law rights rather than waiting for legislative action and the individual's approach to statutory construction.[38]

A second basis for ideological evaluation is a judicial candidate's position on particular legal doctrines. The specific doctrines to be considered will

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35. A major issue in the debate over the confirmation of Robert Bork was whether his philosophy of "original intent" was a too restrictive basis for constitutional interpretation. *See* D. RUTKUS, SENATE CONSIDERATION OF THE NOMINATION OF ROBERT H. BORK TO BE A SUPREME COURT ASSOCIATE JUSTICE: BACKGROUND AND AN OVERVIEW OF THE ISSUES, CONG. RES. SERV. REP. No. 87-761, 36-39 (1987).

36. There is voluminous literature debating the proper method of interpreting the Constitution. Some of the more prominent works include: M. PERRY, THE CONSTITUTION, THE COURT AND HUMAN RIGHTS (1982); J. ELY, DEMOCRACY AND DISTRUST (1980); R. BERGER, GOVERNMENT BY JUDICIARY (1977).

37. For a discussion of the role of precedent in constitutional interpretation, *see, e.g.*, Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988) (offering a rationale for role of precedent which permits competing societal influences to be reconciled with stare decisis); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (examining use of precedent outside the law to give new perspective on how it should function in the law).

38. This article has not focused at length on differences in the criteria for evaluating judges depending on the specific court involved. However, the evaluation process should include recognition of differences, for example, between state supreme courts and federal courts and the fact that the former play a pivotal role in the development of state common law and in interpreting state statutes.

vary over time. During the 1930's, President Roosevelt rightly considered candidates' views on the proper scope of federal power because of his desire to ensure the approval of New Deal programs.[39] During the 1950's and 1960's, the Senate should have assured that federal judges would be committed to upholding the Supreme Court's desegregation decisions.[40] During the 1980's, it is appropriate for the Senate to consider a nominee's views on topics such as whether the Constitution protects a right to reproductive privacy, whether the individual believes the Bill of Rights should apply to the states, and whether the equal protection clause protects women from discrimination.

Finally, it is appropriate to consider a judicial candidate's views on important previously decided cases. How does the judge view *Brown v. Board of Education*, *Baker v. Carr*, or *Roe v. Wade*? Certainly, an individual's position on these precedents is revealing of his or her ideology and likely performance as a judge.

I realize, of course, that the legal doctrines or cases selected will depend directly on the evaluator's own ideology. Although some might insist on judges who are committed to upholding *Brown*, *Baker* and *Roe*, others might believe that judges should be rejected for having those beliefs. The use of ideology in the evaluation process is thus equally available to those who have radically different views from one another. During the early 1980's, conservative Senators Jeremiah Denton and John East asked some prospective federal judges to answer a series of questions.[41] Included were questions such as "Do you believe that the Constitution guarantees a right to privacy? If so, please indicate the constitutional sources of that right, its precise nature and its limitation?" Also, there were detailed questions about the nominee's views on abortion and questions dealing with subjects such as the death penalty, the exclusionary rule, and affirmative action. All of the inquiries concerned the nominee's beliefs; none asked how the individual would vote in a specific case. Although I could not disagree more with the political and constitutional values of then-Senators Denton and East, I believe that their questions were generally appropriate. Senators, whether they are liberal or conservative, should be able to learn about judicial nominee's views and ideology.

Ultimately, the argument over judges becomes an argument over the desired meaning of the Constitution. I regard that as good rather than bad. I

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39. Background Paper, *supra* note 15, at 49-51.

40. For a discussion of the importance of the lower federal courts in securing compliance with desegregation orders, see J. BASS, UNLIKELY HEROES (1981) (discussing role of Fifth Circuit judges in turning Supreme Court's *Brown* decisions into revolution for equality).

41. Questions by the Honorable Jeremiah Denton and Honorable John P. East to Andrew Frey, Nominee to the District of Columbia Court of Appeals, *reprinted in* TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 107-11.

think that the best possible celebration of the Constitution's Bicentennial was the Bork confirmation hearings which took place exactly 200 years after the Constitution was drafted in Philadelphia. For a few weeks, the nation's attention was riveted on the Constitution. Conversations were dominated by discussions of whether the Constitution should be limited to the framers' views and whether there should be a right to privacy. Such discussions are important in informing the public about the content of the Constitution and the nature of judicial decisionmaking.

I realize that not every judicial candidate will have views on every doctrine or case. An evaluator must be sensitive to this, but realistic, as well. Does anyone really lack a position on *Brown v. Board of Education* or *Roe v. Wade*? Certainly, an individual's views on issues can change over time. The evaluator, however, will have to make a judgment as to whether a claimed shift is genuine or whether it is a "confirmation conversion," a change motivated by a desire to secure appointment and confirmation to the court.

But how is the evaluator to ascertain a judicial candidate's views on key matters? There are three primary sources of information: the candidate's prior writings and speeches, the candidate's prior judicial decisions, and questions to the candidate during the confirmation process. The easiest of these sources to use is the prior writings and speeches of the candidate. Such documents reveal a person's views on judicial methodology, particular doctrines, and specific cases. While there are two arguments against examining a judicial candidate's writings and speeches, neither has merit.

First, it can be argued that people may express positions in writings or speeches that they do not believe; that they are simply trying to be provocative. Therefore, it is unfair to use a person's writings as evidence of his or her beliefs. This argument was made in defense of some of Robert Bork's more extreme positions. I am very skeptical of this defense, especially when evaluating an academic's writings or speeches. I do not know any law professors who write things they do not believe. Unlike attorneys who must advocate the best interests of their clients, academics have the freedom to espouse their own positions. Moreover, any time such a defense is raised, the appropriate response is to examine the bulk of the person's writings. Does the provocative writing fit within the overall pattern of views expressed; was it expressed on one occasion or repeatedly? The defense of Judge Bork on this ground was unpersuasive because each of his controversial views was consistent with his underlying philosophy and each had been restated frequently over a long period of time. [42]

Second, I have heard some say that allowing review of a judicial candi-

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42. Backgound Paper, *supra* note 15, at 103 (describing Senator's concerns that Bork had undergone a confirmation conversion).

date's writings will serve as a disincentive to people taking controversial positions in print. This argument, however, ignores all of the other incentives that people have to espouse distinctive views. For example, given the large volume of legal scholarship, one way in which a person may be noticed is by presenting novel arguments and approaches. Also, it is hard to imagine that very many people will try throughout their careers to shape their writings to please an anonymous group of potential evaluators at some unknown, possibly never existing future time.

In addition to examining a person's prior writings and speeches, a second major source of information is previous judicial decisions. If the candidate has prior judicial experience, much can be learned about the individual's ideology from cases already decided. Two possible objections that have been advanced have considerably more merit than the arguments against considering a candidate's writings or speeches.

One argument is that looking to a judge's past decisions threatens judicial independence because of fear that judges will decide cases with an eye to the evaluation that may later follow. This is a serious concern. As discussed above, judicial independence requires that a judge decide a matter according to his or her best views of the proper outcome. But there is at least the danger that some judges might be influenced in their decisionmaking by the knowledge that their opinions will be scrutinized when their performance is evaluated.[43]

There is no easy answer to this concern. Ultimately, a balancing choice must be made as to whether it is more important to have the ideological information to be gained from reading past opinions or whether it is more essential to preserve judicial independence by preventing a judge's decisions from being examined in any review process. Although I choose the former, there are others who take the latter position and thus exclude consideration of a judge's past decisions from an appraisal of his or her ideology.

A further concern with looking to a judge's prior decisions is the need to be sensitive to distinctions between trial courts, intermediate appellate courts, and the highest court within a jurisdiction. Judges on trial and intermediate appellate courts are obligated to apply the law as set forth by higher courts. Accordingly, many rulings might not be reflective of a judge's own beliefs as to how the case should have been handled, but instead indicate the judge's reading of the appropriate precedents.

A final source of information about judges—and undoubtedly the most important—is direct questions to judicial candidates from the evaluating body. The evaluator—be it the President, a governor, the Senate, or the voters—should insist as a prerequisite to approval that the candidate answer

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43. *See* Chemerinsky, *supra* note 30, at 1991.

questions about judicial methodology, about specific doctrines, and about particular cases.

Throughout much of America's history, federal judicial nominees did not appear before the Senate or the Senate Judiciary Committee.[44] The first Supreme Court nominee to personally testify before the Senate was Harlan Fiske Stone who appeared to answer charges that an investigation conducted by the Justice Department while he was Attorney General had been motivated by political revenge.[45] Even after Stone's testimony, many candidates did not appear and those that did often set strict guidelines for Senate questioning. Felix Frankfurter, for example, informed the Senate that it would be "improper for a nominee no less than a member of the Court to express his personal views on any controversial political issues affecting the Court."[46]

Nominees for the Supreme Court did not begin appearing before the Senate on a regular basis until 1955, commencing with the nomination of John Marshall Harlan.[47] The scope of questioning has varied enormously, as has the willingness of nominees to answer inquiries. Some Justices—especially Justices Rehnquist, Powell, Stevens, and O'Connor—were aggressively questioned while others—such as Justices White, Goldberg, and Burger—were subjected to little scrutiny.[48] Some nominees were willing to answer virtually all questions, but others refused to answer even quite mundane questions about their views. Judge Bork, for example, was extremely willing to discuss his positions on countless disputed questions of constitutional law.[49] In sharp contrast, Justice Scalia refused to answer questions about any specific Supreme Court case. Justice Scalia, for example, refused to answer a question about *Marbury v. Madison* and stated that "I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*."[50] When Scalia was asked whether he believed in a constitutional right to privacy, he again refused to answer, stating, "I do not think I could answer that, Senator, without violating the line I've tried to hold."[51]

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44. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TULANE L. REV. 109, 116 (1987).

45. *Id.* at 126; *see also* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 188-97 (1956).

46. Ross, *supra* note 44, at 117 n.28.

47. *Id.* at 119.

48. *Id.* at 120.

49. For a review of the questioning of Bork by the Senate Judiciary Committee, see Totenberg, *The Confirmation Process and the Public: To Know or Not Know*, 101 HARV. L. REV. 1213, 1220-24 (1988).

50. *Hearings Before the Senate Comm. on the Judiciary, on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States*, 99th Cong., 2d Sess., 33 (1986).

51. *Id.* at 102.

I contend that responses such as those of Scalia should be deemed impermissible and that the Senate should refuse confirmation of anyone who refuses to answer questions about his or her judicial philosophy, specific doctrines, or particular past decisions. As established earlier, a judicial candidate's ideology is a proper basis for evaluation and the evaluator thus needs to know the individual's views. Few candidates have the volume of writing produced by Robert Bork. The Senate (or the voters in a retention election) should not be precluded from an effective evaluation merely because the candidate did not write articles. Nor should the process favor the appointment of those without a "paper trail" by only subjecting those with past writings to ideological scrutiny. The Senate voted against Robert Bork, in part, because his views on privacy were deemed unacceptable. Likewise, it should be able to vote against anyone with similar beliefs. It should have been able to learn Antonin Scalia's views before confirming his appointment to the Court.

There are, of course, limits to the permissible questioning. Acceptable questioning includes asking about a person's philosophy of judging (such as, whether the Constitution is limited to the framers' views), asking about the individual's position on particular legal doctrines, and a person's views on specific prior decisions. I do not believe that a judicial candidate should be asked directly how he or she *will* vote on a particular issue or in a specific case, though often that can be inferred from permissible questions. The outcome of any case can depend too much on context and circumstances to permit such promises. Moreover, the judge's actual vote might be influenced by persuasion from attorneys or colleagues on the bench.

I admit that the distinction between what is permissible and what is forbidden under this approach is somewhat ephemeral. Is there really a difference between asking a person his or her views on *Roe v. Wade* and the right to privacy, as opposed to asking directly whether the individual would vote to overturn *Roe*? The former questions certainly are asked with the hope of eliciting information about the latter. Yet, I am convinced that there is a difference. The former is asking a person for his or her views; the latter is asking for a prediction or a promise. Judicial candidates can be expected to have views on important legal questions, but not plans for how they will vote in specific instances. Even if the distinction is only in phrasing, it is preferable that judges not be asked to make explicit promises as to their performance once on the bench.

The primary criticism of intense questioning about a judicial candidate's views is that it will create the appearance of closed-mindedness. In other words, to preserve the appearance of judicial impartiality, it is claimed that a prospective judge should not express any views on subjects that are likely to come before his or her court. The Twentieth Century Fund's Task Force on Judicial Selection, for example, recently issued a report stating that nominees

for the Supreme Court should not be expected to appear as witnesses at their confirmation proceedings.[52] Similarly, Chief Justice Rehnquist gave a speech criticizing the Senate's intensive questioning of Judge Robert Bork.[53] Opposition to such questioning usually results from the idea that litigants will not feel they have an open-minded judge if during the confirmation process the judge expressed views about the subject matter of the proceedings.

This position is based on the premise that ignorance is better than knowledge. No judge is a blank slate; every judge has views on important legal issues before assuming the bench and those pre-existing positions influence decisions. Whether stated or not, these views still exist. Thus, a judicial candidate's refusal to answer questions does not necessarily communicate that the individual is uncommitted and thus is truly open-minded on the subject. Justice Scalia's refusal to answer questions on *Marbury v. Madison* or the right to privacy surely convinced no one that he is without views on these topics. In short, prohibiting questioning about ideology does not create even the illusion of neutrality; it only perpetuates ignorance about the individual's actual beliefs.[54]

I strongly believe that attorneys and parties are better off knowing a judge's views on a subject rather than guessing or pretending that the jurist has no position. Information about a judge's beliefs has enormous advantages. It might facilitate settlements as parties can better assess their chances of prevailing at trial. It can aid strategic decisions, such as whether to take an appeal to a particular court. Most of all, it can improve argumentation as lawyers know more about the audience—the individual judges that they are addressing.

Nor would a judge be disqualified from sitting on a case because he or she previously expressed views on the subject at issue. The Supreme Court declared in *Federal Trade Commission v. Cement Institute* that no "decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."[55] Justice Rehnquist stated this even more strongly in his opinion explaining why he did not recuse himself from sitting in *Laird v. Tatum*.[56] In *Laird*, the Supreme Court considered whether army surveillance of domestic groups violated the First Amendment. Prior to his nomination and confirmation to the Court,

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52. TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 10.

53. Remarks of William H. Rehnquist, Bicentennial Australian Legal Convention, August 29, 1988 (copy on file with the Georgetown Journal of Legal Ethics).

54. For an excellent discussion of specific kinds of questioning and what should be prohibited and allowed, see Ross, *supra* note 44, at 146-72.

55. 333 U.S. 683, 702-03 (1948).

56. 409 U.S. 824 (1972).

Rehnquist testified on behalf of the Justice Department in favor of the constitutionality of such practices. Rehnquist wrote:

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal actions. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rosa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.[57]

Assuring impartiality does not require that the judge pretend to lack views on important topics of constitutional law.

Moreover, prohibiting questioning of nominees about their ideology preserves and encourages an anachronistic, mechanical view of judging. At a time when there was a widespread belief in formalism, questioning of prospective judges was unnecessary because the outcome was thought to depend little on the identity of the judge. The refusal of judges to answer questions perpetuates a notion either that the individual's ideology does not matter or that the judge rises to the bench with far more neutrality than is humanly possible. Institutionalization of Bork-like confirmation proceedings will hopefully encourage the general public to adopt a more sophisticated understanding of the judging process.

Thus, I believe that the Senate's questioning of Robert Bork was just and proper and should be the norm in the future. Bork was an easy case for application of the ideological orientation model because he had expressed his views in so many articles and speeches. However, less prolific nominees whose views are not known should not be immunized from such review. In judicial elections and before confirming bodies, judicial candidates should be required to discuss their views about the law. Rose Bird, Joseph Grodin, and Cruz Reynoso should have been allowed (even encouraged or required) to address the voters prior to the retention election as to their views on the death penalty. The First Amendment embodies the philosophy that knowledge is better than ignorance. The same principle should apply in the judicial selection process.

IV. ADAPTING JUDICIAL ETHICS TO PERMIT SCRUTINY OF JUDICAL CANDIDATES

There is one notable obstacle to the implementation of the ideological ori-

57. *Id.* at 835 (Rehnquist, J., memorandum).

entation model: the American Bar Association's *Code of Judicial Conduct*. Specifically, Canon 7(B)(1)(c) provides:

> A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system of election . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.[58]

The rule does not apply to prevent questioning of prospective judges in systems where judicial selection is by appointment rather than election. The very terms of this Canon make it clear that it pertains to elections.

However, forty-two states have some form of judicial elections.[59] In these places, the *Code of Judicial Conduct* imposes a substantial barrier to judicial candidates being able to express their views. The prohibition on expressing "views on disputed legal or political issues" makes questioning of judicial candidates virtually impossible. Nor is this proscription idle rhetoric. There are several instances where judges have been disciplined for violating this provision.[60] For instance, in *In re the Matter of Honorable James C. Kaiser*, a judge was censured for making statements in an election campaign that he would be "tough on drunk driving" and for criticizing many of the attorneys who represent drunk drivers.[61]

The easiest solution to this problem would be to amend the *Code of Judicial Conduct* to permit judicial candidates to answer questions about their judicial philosophy, their views about particular doctrines, and their positions on specific cases. Such an amendment would insure that no judicial candidate would need to refrain from speech out of the fear that answers to questions might lead to disciplinary sanctions.

Yet, such reform by the American Bar Association (or by the individual states adopting the *Code of Judicial Conduct*) may very well be unnecessary because there is a strong argument that the restriction on speech is a violation of the First Amendment.[62] First, the restriction on judicial speech during election campaigns is a curtailment of political speech which is viewed as

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58. CODE OF JUDICIAL CONDUCT, Canon 7B(1)(c) (1984).

59. Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 452 (1988).

60. *See* Lubet, *Judicial Impropriety : Love, Friendship, Free Speech and Other Intemperate Conduct*, 1987 ARIZ. ST. L. REV. 379.

61. 111 Wash. 2d 275 (1988).

62. For an excellent recent article on the subject, see Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (discusses constitutionality of the *Code of Judicial Conduct*'s restriction of judicial candidate's freedom of speech).

being at the very core of the First Amendment.[63] Speech relating to the political process, the choosing of government officers, can be limited only if there is a truly compelling government need and there is no less restrictive way to accomplish the objective. The Supreme Court has explained that the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office."[64]

No compelling interest exists to justify preventing a judicial candidate from openly discussing his or her views. As described above, the need to preserve the appearance of judicial impartiality does not justify silencing judges.[65] The First Amendment is based on the strong assumption that people are better off with more information in making judgments about the political process. Censorship of speech to hide a judge's beliefs is incompatible with this premise. Moreover, a restriction on all speech about controversial issues is not necessary to achieve the government's purpose in prohibiting speech. The goal of preserving impartiality can be achieved by prohibiting individual judicial candidates from making promises of how they would decide specific cases or issues.

Second, the prohibition on speech by judicial candidates about controversial issues risks serious distortion of the marketplace of ideas and information. Judges can be falsely attacked, their positions distorted and misconstrued, and yet, they are forbidden to respond. Falsehoods never get countered with the truth. In California's recent retention election, for example, there were repeated statements about the beliefs of several members of the Court on issues such as the death penalty. To the extent that their views were distorted, the justices could not respond. Allowing speech, even about controversial issues, improves decisionmaking and prevents falsehoods from going unanswered.

V. CONCLUSION

The irony of the confirmation battles over Bird, Grodin, Reynoso and Bork was the political line-ups. Many of the same individuals who attacked Bird, Grodin and Reynoso based on their ideology subsequently argued in defense of Bork that his ideology was irrelevant. Conversely, many of the same people who defended Bird, Grodin and Reynoso with pleas to focus only on their professional qualification attacked Bork based on his ideology.

This article has argued that the ideological evaluation was proper in both instances. This is not to say that one need agree with the results in either or both cases; one could defend the ideology of each of these judges. Rather,

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63. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1130-32 (2d ed. 1988).
64. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).
65. *See* Snyder, *supra* note 62, at 226-39.

the point is that the objection to the outcomes in these cases must be made in substantive terms that judges with their beliefs should have been confirmed.

Ultimately, disputes over confirmation are battles over the proper content of the law. This is as it should be and attention should not be diverted by claims that it is improper to consider a nominee's ideological orientation. In fact, a process should be institutionalized to ensure a full and careful examination of each candidate's views.